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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

YALE LUBMAN, THOMAS J. MURPHY,
JOHN S. SEISS AND JOSEPH STEWART,
Petitioner

—V.—

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION
AND IN THE ALTERNATIVE
REQUEST FOR SUMMARY AFFIRMANCE

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QUESTIONS PRESENTED

1. Are the Baltimore City Ordinances (the "Ordinances") valid under the Contracts Clause and Takings Clause of the Federal Constitution, and do they accord to the beneficiaries of the pension funds the due process of law?

2. Are the Ordinances a valid exercise of state powers, consistent with the Interstate Commerce Clause of the Federal Constitution?

3. Are the Ordinances a valid exercise of state and local powers, not preempted by federal statute or regulation?

4. Are the Ordinances consistent with the federal authority over foreign affairs, and with the Foreign Commerce Clause of the Federal Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION
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Respondent Mayor and City Council of Baltimore urges that the Petition for Writ of Certiorari filed herein which seeks review of the Maryland Court of Appeals' decision in *Board of Trustees of the Employees' Retirement System of the City of Baltimore, et al. v. Mayor and City Council of Baltimore City*, 317 Md. 72, 562 A.2d 720 (1989) be denied, or in the alternative, that this Court summarily affirm the decision of the Maryland Court of Appeals pursuant to Rule 16.1 of the Supreme Court Rules.

STATEMENT OF THE CASE

The Maryland Court of Appeals unanimously affirmed a ruling of the Circuit Court for Baltimore City¹ sustaining the validity of Baltimore City Ordinances Nos. 765 and 792 of 1986 ("the Ordinances"). The Ordinances require that the Boards of Trustees ("Trustees") of the Baltimore City Employee Pension Funds² divest their holdings in companies doing business in South Africa and Namibia ("SA" companies) within two years, plus such extensions as the Ordinances permit.³ The Court of Appeals concluded that the Ordinances represent a moderate attempt by the City of Baltimore "simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds." P. App. at D-61. The Ordinances "permit the City and its citizens to distance themselves from the moral taint of co-venturing in firms that in the view of many, help to maintain South Africa's system of racial discrimination." P. App. at D-82.

The Court of Appeals held, as a matter of Maryland law, that the Trustees are agencies of Baltimore City, P. App. at D-16, to administer retirement systems "established" and "maintained" by the City pursuant to its general charter powers. Baltimore City Charter, art. II, 24-26 (1964); Respondent's Appendix ("R. App.") at A-1 to A-7. The Funds' annual reports acknowledge that each Fund is a "component unit" of the City because of, *inter alia*, financial interdependency with the City, the City's right to designate management, the City's ability to significantly influence

¹The Circuit Court opinion is printed in Petition Appendix ("P. App.") at E-1 to E-31.

²Employees' Retirement System of the City of Baltimore ("ERS"); Fire and Police Employees Retirement System of the City of Baltimore ("F&P"); and the Elected Officials Employees Retirement System of the City of Baltimore ("EOS") --hereinafter collectively "the Funds." The Funds have a stipulated value of \$1.2 billion, and are pooled for investment purposes.

³The Trustees were empowered to suspend the operation of the Ordinances in order to make doubly sure that the performance of the Funds would not suffer. The standards and procedures prescribed for suspension are summarized at P. App. D-4 and D-5. The two year period has been continuously suspended and has not yet begun to run with respect to the ERS and the F&P. As to the EOS, which amounts to only approximately \$2.7 million, the operation of the Ordinances was suspended until February 1, 1989.

operations, and the Funds' accountability to the City for fiscal matters. R. App. at C-1 to C-6.

The powers of the Trustees with regard to investment have been closely regulated by the City from the inception of the Funds. Baltimore City Code, art. 22, §§ 7, 23 & 35 (1989 Supp.); R. App. at B-1 to B-14, B-16 to B-30. The Ordinances amended these sections of the City Code by adding to the limitations on the Trustees' investment powers a provision that at the expiration of two years after the Ordinances' effective date, plus applicable extensions, the Trustees shall be divested of holdings in SA companies. The Ordinances did not change any provisions relating to benefits.

In December, 1986, the Trustees filed this action in the Circuit Court for Baltimore City seeking to have the Ordinances declared invalid. P. App. at D-6. Petitioners unsuccessfully attempted to intervene.⁴ After a lengthy trial, during which "the parties presented a large amount of highly technical evidence concerning the Ordinances' financial impact", P. App. at D-7, the trial court upheld the validity of the Ordinances. The Maryland Court of Appeals affirmed this holding in a painstaking and exhausting opinion. P. App. at D-1 to D-88.⁵ The Court of Appeals reversed the denial of intervention, but Petitioners waived any right to a remand for additional evidence, declaring themselves content with "the status of parties" before the Court of Appeals "and for all future proceedings in the case. . . ." P. App. at D-18. Both the trial court and the Maryland Court of Appeals closely examined and then rejected the crux of Petitioners' argument—the contention that the Ordinances significantly impact on the assets of the Funds and on interstate and foreign commerce. It was conceded during the course of the trial that the Ordinances would not impair the performance of the fixed income investments of the Funds. P. App. at E-26. Similarly, no expert for either side could opine that the Ordinances would adversely affect

⁴Counsel for Petitioners did not participate in the evidentiary phase of the trial; however, Petitioners were represented by the Trustees acting in their fiduciary capacity, and Petitioners' counsel were permitted to participate in legal argument.

⁵After reviewing the Court of Appeals decision, the Trustees voted not to seek certiorari.

the Funds' equity investments, and the evidence did not permit the conclusion that such an adverse effect would occur. *Id.*; P. App. at D-8.⁶

After exacting examination, the cost of divesting to the Funds was found to be miniscule. The trial court fixed the total of the one-time initial divestment cost for the Funds' equity and fixed-income portfolios at \$750,000. P. App. at E-30. It fixed the annual incremental cost of trading SAF stock at \$300,000, *id.* at E-28, and the reduction of the annual return on the Funds' short term investment at \$900,000. It found that "[r]ealistically . . . the initial cost to the pension system as a result of the Ordinance[s] is one thirty-second of 1%, and the ongoing annual cost is one-twentieth of 1%." *Id.* at E-31. The Court of Appeals agreed. *Id.* at D-11. Neither the Trustees nor the Petitioners have challenged these figures. Maryland's Court of Appeals affirmed the trial court's finding of fact that "nothing in the evidence suggests that the Ordinance will jeopardize . . . one iota" the defined benefits payable to present or future retirees. *Id.* at E-29-30.⁷

⁶Petitioners' attempt to use the the market capitalization of the SA companies on the Standard & Poor 500 list as a measure of the impact of divestiture, *see* Petition at 4, is specious. For example, eliminating the half of the United States east of the Mississippi River from the area of the United States to be searched for the highest mountain in the United States would not diminish the statistical probability of finding the highest mountain in a search confined to the remaining area. Similarly, as found below, the universe of equities left after divesting holdings in SA companies permits the selection of investment portfolios which will perform as well if not better than undivested portfolios, P. App. at D-32-33, and will have approximately the same level of exposure to market risk. As the Court of Appeals stated, under the divestiture program, "economically competitive, substitute investments remain available." P. App. at D-33. At most, divestment simply involves more frequent stock transactions, P. App. at D-11—clearly not a barrier to commerce.

A significant portion of the SA companies' market capitalization cited by Petitioners is represented by one company, IBM. P. App. at E-23. Further, although South-Africa-Free ("SAF") companies tend to have a smaller capitalization than do SA companies, the average capitalization of a company in a SAF portfolio is still \$3.7 billion, *id.* at E-24, and in the long run such stock performs as well or better than that of companies with larger capitalization. P. App. at D-9. "[A]dequate SAF replacement stocks can be found even though the SAF companies will be replacing larger companies." P. App. at E-25.

⁷Consequently, Petitioners' assertion that the rate of return on the pension trust funds will decline, Petition at 18 n.4, is absolutely incorrect. *See* P. App. at D-8, D-32-33.

The scope of the Ordinances is tightly circumscribed. The Ordinances simply direct how and in what securities public funds should be invested by a public instrumentality. They apply only to the Trustees. They do not curtail any rights or impose any obligations on individuals or on the companies themselves. They do not require private parties to do anything. They do not affect direct transactions in the regular course of any SA company's business. They are not a boycott. They do not threaten any SA company with the loss of revenue in the operation of its business, or impose any penalty or restriction on any company.⁸ They do not favor residents of the City of Baltimore or the State of Maryland or any other state. They do not reflect an intention on the part of Baltimore City to secure economic advantages for local businesses at the expense of businesses situated elsewhere. They cover only a "discrete, identifiable class of economic activity," P. App. at D-74,

⁸Petitioners' contention that if the decision of the Maryland Court of Appeals is allowed to stand, "any state or city in this country could adopt legislation that *penalized American companies* for doing business in any foreign nation with whose internal policies that particular city or state administration disagreed," Petition at 12 (emphasis added), strays beyond the record in this case and exceeds the bounds of fair argument. So does Petitioners' contention that the Ordinances are "prescriptive legislation that purports to have binding impact on the activities of Americans abroad or on the conduct of foreign governments." Petition at 7.

Similarly, Petitioners' reliance, Petition at 14 n.3, on *Wickard v. Filburn*, 317 U.S. 171 (1942), is misplaced. First, the Ordinances cannot be fairly lumped with exclusionary procurement laws which prevent sales or contracts with the companies targeted by such laws, or lumped with other divestment ordinances or statutes much differently drafted, or with ordinances pertaining to Northern Ireland, nuclear free zones, etc. Petition at 8-10. Second, *Wickard* held that the triviality of any individual farmer's production did not preclude Congress, in the exercise of its plenary power over interstate commerce, from including that farmer's production in an overall regulation covering the total crop of all farms, whereas the instant case involves the validity, under the "dormant" commerce and foreign relations powers, of the Ordinances of a single city. In the instant case, Petitioners' "aggregate effect" argument proves too much. It would overturn all the well-settled cases on this subject ever decided by this Court. If the test of validity of local legislation with "foreign resonances" were the speculative aggregate effect of all the laws with foreign resonances that could conceivably be enacted throughout the country, then not one of the precedents of this Court upholding such laws, when the effect of the law before the Court was only indirect and incidental, could have been decided as it was. *Wickard* has no relevance here.

namely, the City's sale and purchase of a limited class of securities.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied, because this case does not raise or implicate any substantial issue of federal constitutional or statutory law. The Ordinances are a valid exercise of a local government's well-settled power over the investment of its funds. The Ordinances no more offend federal statutory or constitutional law than would the decision of any investor to select one security rather than another.

The "Questions Presented" as framed in the Petition mischaracterize the nature and effect of the Ordinances, and there are no "special and important reasons" (which Rule 10 of the Rules of this Court requires) why the questions actually raised by the record in this case should be reviewed by this Court.

If, however, notwithstanding the legal insubstantiality of the issues presented by this record, the political significance of the Ordinances disposes the Court to pronounce upon this case, Respondent urges summary affirmance of the decision of the Maryland Court of Appeals pursuant to Supreme Court Rule 16.1.⁹ That decision below upholding the Baltimore City Ordinances is compelled by the facts established at trial and by well-settled federal law.

The Ordinances are not an unconstitutional impairment of contract because: (a) there is in fact no contractual right or obligation impaired by the Ordinances; (b) even if a contract right could be said to be impaired, the impairment is not substantial; and (c) any conceivable impairment would be not only minimal but also a justified exercise of local powers.

The Ordinances do not deprive the Petitioners of due process of law or take property without just compensation, because Petitioners have no property interest in the Funds themselves; they have only a contract interest (which the Ordinances do not change) in certain benefits provided pursuant to Article 22 of the Baltimore City Code.

⁹"[T]he Court may summarily affirm when it believes that the decision below is not only correct but that the issue is sufficiently important to need the added weight of Supreme Court approval." Stern, Gressman and Shapiro, *Supreme Court Practice* 287 (6th ed. 1985).

The Ordinances do not violate the Interstate Commerce Clause because they are a valid exercise of state or local power exempted from the strictures of the Interstate Commerce Clause by the "market participant" doctrine; and even if the "market participant" doctrine did not apply, the Ordinances would be valid under the Commerce Clause because their effect on commerce is incidental and non-discriminatory, and they effectuate legitimate local public interests. The Ordinances have not been preempted under the Supremacy Clause by an express federal statute or regulation, by Congressional occupation of the field or by conflict with federal law or regulation; in fact, Congress has indicated that state and local divestment ordinances are expressly permitted and fully consistent with federal policy toward South Africa. Finally, the Ordinances do not infringe upon either the federal foreign relations power or the Foreign Commerce Clause; the Ordinances are a proper exercise of state sovereignty, they concern investment by a local governmental instrumentality—a matter traditionally within state power—and they have only slight, indirect and incidental effect on foreign affairs or foreign commerce.

ARGUMENT

I. The Baltimore City Ordinances Do Not Violate the Contracts Clause of the Federal Constitution and Do Not Take Petitioners' Property Without Just Compensation or Deny Petitioners Due Process of Law.

A. The Ordinances Do Not Violate the Contracts Clause.

The Ordinances do not change any contractual obligation, their effect on benefits from the Funds is insubstantial, and they are "reasonable and necessary to serve an important public purpose." *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Company v. New Jersey*, 431 U.S. 1 (1977).

1. The Ordinances Do Not Change Any Contractual Rights or Obligations.

Petitioners do not identify any specific contractual right or obligation impaired by the Ordinances. Petition at 20-21. In fact, the Ordinances do not alter or impair any contract rights. The Court of Appeals properly concluded, and Petitioners have pointed to

nothing that would detract from that conclusion, that the Ordinances do not “alter the provisions in the law concerning the amount of benefits that a retiree is entitled to receive, [and thus] do not directly change the City’s pension contracts with the system’s beneficiaries.” P. App. at D-28. No direct financial obligation of the City has been changed. No existing appropriation has been rescinded. No trust or pledged funds have been diverted to other uses. *Cf. United States Trust Company v. New Jersey*, 431 U.S. at 20-21.

Petitioner’s only ground for complaint under the Contracts Clause is that the initial and ongoing costs of divestiture may slightly diminish future variable benefits. However, the Baltimore City Code has at all material times made clear that these benefits “shall not become an obligation of the City of Baltimore.” See Baltimore City Code, art. 22, § 17(e) (ii) (1983 Repl. Vol.); R. App. at B-15. As the Court of Appeals pointed out, this provision means that while Petitioners have contract rights to whatever variable benefits are earned, they have no such rights to any particular level of earnings or to any variable benefits beyond the prescribed percentage of whatever the earnings are. P. App. at D-28 n. 26.¹⁰

2. Even if the Ordinances Impaired Petitioners’ Contract Rights, the Contracts Clause Would Not Be Violated, Because the Impairment Would Be Insubstantial.

Impairment of a contractual obligation is not constitutionally invalid under the Contracts Clause unless it is “substantial”, and the burden of establishing substantiality is on Petitioners. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983). In the instant case, there is no gainsaying the trial judge’s findings, affirmed by the Maryland Court of Appeals, that the cost of the Ordinances to the retirement systems, and thus to the systems’ beneficiaries in terms of future variable benefits, “is so minimal that it does not approach the constitutional

¹⁰Variable benefits already accrued are funded by Guaranteed Investment Contracts (in the nature of annuities) and are in no way affected by the Ordinances. The Petitioners’ assertion that the Court of Appeals found that “there was no impairment of contract because the change in variable benefits would be insubstantial”, Petition at 6, is incorrect. Instead, the Court below actually held that variable benefits were by definition “speculative and uncertain”, and therefore the beneficiaries could have no “distinct expectation” as to the amount of variable benefits they would receive. P. App. at D-44-45.

standard for impairment." P. App. at E-29-30. Also weighing heavily against any contention that the Ordinances work a substantial impairment is the fact that investment of Fund assets has always been closely regulated by ordinance, and the permissibility of particular investments has been readily changed by legislation as deemed appropriate. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. at 411; *United States Trust Co.*, 431 U.S. at 21 n.17.¹¹ The frequent changes traditionally made by the City in the Trustees' investment authority are notice that further changes are to be anticipated; and that anticipation blunts the impact, and thereby reduces the substantiality of the impact of any particular change. Cf. *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965) (as in the case of the variable benefits here, any impairment was not substantial because the asserted covenant "was not the central undertaking" of the city "nor the primary consideration" for the alleged contractual undertaking).

Because, as the Maryland Court of Appeals correctly stated, variable benefits are "as their name suggests, speculative and uncertain", P. App. at D-45, any impairment of these benefits is not substantial; to the extent the Ordinances affect such benefits, the Ordinances do not interfere with "distinct investment-backed expectations." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

3. In Any Event, the Ordinances Are a Justified Exercise of Local Legislative Power Because They Are Reasonable and Necessary to Serve an Important Public Purpose.

This Court has recognized that even a substantial impairment of contract will not violate the contract clause if it is justified as reasonable and necessary to advance an important and legitimate

¹¹As the Maryland Court of Appeals pointed out, the Petitioners' contractual right to receive benefits does not give them a right to direct or control the investment of funds in the pension systems. P. App. at D-43. See also *Withers v. Teachers' Ret. System*, 447 F. Supp. 1248, 1260 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2d Cir. 1979) (beneficiaries of a public retirement fund "have no entitlement to, or right to direct the retention of, the particular assets that are held for investment purposes in the pension fund"); *Crown v. Patrolmen's Variable Supp. Fund Trustees*, 659 F. Supp. 318, 320 (S.D.N.Y.), *aff'd*, 819 F.2d 47 (2d Cir. 1987); *Tron v. Condello*, 427 F. Supp. 1175, 1189-90 (S.D.N.Y. 1976) (beneficiary "has a vested right in receiving his pension benefits, but not in regulating the investment policy set by the legislature and the retirement board").

public purpose.¹² *United States Trust Company v. New Jersey*, 431 U.S. at 21-26; *Allied Structural Steel Company v. Spannaus*, 438 U.S. at 244; *Energy Reserves Group*, 459 U.S. at 411-12. An impairment of contract is reasonable if it responds to developments that were unforeseen and unintended when the contract provision in question was made, *United States Trust Co.*, 431 U.S. at 31 n.30, or if it addresses a broad social problem in an effort to protect the public morals or otherwise promote the public welfare. *Allied Steel*, 438 U.S. at 241-42. It is "necessary" when there is no less drastic or restrictive measure appropriate to resolve the problem. *Energy Reserves Group*, 459 U.S. at 412.

The Ordinances here meet these criteria. Divestment of proprietary interests in SA companies is both reasonable and necessary for Baltimore City. The majority of Baltimore City's citizens are African-American. The use of city funds to invest in companies helping to support the economic base of discrimination and oppression in South Africa is of particular concern to the growing number of African-American members and beneficiaries of the pension funds and to all the citizens of Baltimore sensitive to the legacy of slavery from which America is still struggling to free itself. The effectuation of the highest and best moral standards of Baltimore City is precisely the kind of important public purpose that the cases contemplate as a basis for permitting even substantial impairments of contractual obligations under the Contracts Clause. See *East New York Savings Bank v. Hahn*, 326 U.S. 230, 233-34 (1945).¹³

¹²The Maryland Court of Appeals made no finding as to whether any impairment would be justified as reasonable and necessary, because it concluded that there was no direct impairment of any contract right or obligation, and that any potential indirect impairment of variable future benefits was so insubstantial as to fail to implicate the Contracts Clause at all.

¹³The Trustees of the pension funds have properly taken social considerations into account in the past, even where this has cost the pension fund money. They made long-term mortgage loans of approximately 35 million dollars in 1983-84 at 1½ to 2 percent below the going interest rate to provide assistance to would-be home owners in a tight market. The "cost" to the fund has been approximately \$525,000 per year.

The Ordinances are not the first instances in which the Trustees have been regulated by ordinances on the basis of social policies having foreign resonances, which work in tandem with federal policy. The pension funds' portfolio of investments includes an investment valued at \$2,269,507.50 in the International Bank for Reconstruction and Redevelopment. The City Council's inclusion of this type of security and of

B. The Ordinances Do Not Take Petitioners' Property Without Just Compensation or Deny Petitioners Due Process of Law.

1. The Ordinances Do Not Take Petitioners' Property Without Just Compensation.

The Ordinances do not affect any property of Petitioners. Petitioners have no property interest in the Funds themselves but only contract interests in the benefits provided by Article 22 of the Baltimore City Code, and only subject to the limitations prescribed by that legislation and discussed above. *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Withers v. Teachers Ret. Sys. of New York*, 447 F. Supp. 1248, 1259-60 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2d Cir. 1979). Thus, there is no property interest affected by the Ordinances, and accordingly, the Maryland Court of Appeals was correct in holding that the Ordinances do not work a taking without just compensation.

2. The Ordinances Do Not Deprive Petitioners of Due Process of Law.

The Due Process Clause does not prohibit even retrospective civil legislation unless the consequences are "particularly 'harsh and oppressive'." *United States Trust Co.*, 431 U.S. at 17 n.13. Consequently, "less searching standards [are] imposed on economic legislation by the Due Process Clauses" than those "imposed on the States by the Contract Clause". *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 733 (1984). Since the Ordinances do not impair Petitioners' contracts, Petitioners have certainly not been denied due process.

securities in the InterAmerican Development Bank as permissible investments demonstrates that the instant Ordinances by no means pioneer in social investments of the funds. These investments were authorized by Ordinance 424 (1964) enacting art. 22 §§ 7(a) (2) and 34(a) (2) of the Baltimore City Code. By statute, the policy of the United States regarding those two institutions is to "advance the cause of human rights, including by seeking to channel assistance towards countries other than those whose governments engage in . . . [a] consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person." 22 U.S.C. § 262 d(a) (1) (1989 Supp.).

II. The Ordinances Do Not Violate the Interstate Commerce Clause of the Federal Constitution.

A. The Ordinances Are a Valid Exercise of State Sovereign Power Exempted From the Strictures of the Interstate Commerce Clause by the "Market Participant" Doctrine.

"... [W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983) (upholding executive order of mayor that city would fund only those construction projects on which 50% of the jobs were filled by *bona fide* city residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976) (upholding law providing subsidies to local residents for scrapping abandoned motor vehicles); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) (upholding refusal to sell to out-of-state buyers cement produced at state-owned plant).¹⁴ The Court of Appeals correctly described the City's role as a market participant:

In mandating the divestment of municipally administered pension funds, the City of Baltimore acted 'as a market participant [T]he ordinances do not attempt to interfere with private, commercial transactions between persons engaged in foreign commerce. Rather, the Ordinances simply represent Baltimore City's decision concerning the proper way of investing funds which the City has the authority to administer and which therefore "belong" to the City, although as a Trustee.

¹⁴The market participant doctrine is based on: (a) "core notions of state sovereignty", Blackmun, J. concurring in *White*, 460 U.S. at 218; (b) the background of the Commerce Clause as a response "principally to state taxes and regulatory measures [such as embargoes, customs, duties and exclusion of imports] impeding free *private* trade in the national market place," *Reeves*, 447 U.S. at 436-37 (emphasis supplied); (c) the feeling that in fairness a state acting as proprietor should "share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause" to the same extent as any other trader, who is permitted "freely to exercise his own independent discretion as to parties with whom he will deal," *Reeves*, 447 U.S. at 438-39; and (d) a "healthy regard for federalism and good government", *id.* at 441, rooted in the residual powers of the States under the Tenth Amendment. Deference is due the state or municipality in a case involving state proprietary action because competing considerations in such cases "often will be subtle, complex, politically charged, and difficult to assess under traditional commerce clause analysis." *Id.* at 439.

P. App. at D-78. The Ordinances are more benign than those measures upheld in this Court's cases applying the market participation doctrine; they do not discriminate in any way in favor of local citizens or against foreign enterprises. They involve only the City's determination of where to invest its funds.

Autonomous fiscal management is the core of state sovereignty, and is a reserved power under the Tenth Amendment. Absent specific congressional legislation exercising a power granted to the federal government by the Constitution (and there is no such legislation here), there is no basis for striking down the decision of the City as to the investments its portfolio should contain. See *Garcia v. San Antonio Metropolitan Transit Authority*, 471 U.S. 1049 (1985). State and local governments have wide latitude to determine how to allocate the resources under their control, even though these allocations may reflect decisions based on social policies and controversial choices. See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). As the Maryland Court of Appeals concluded, based upon the statements of this Court, "just as a private merchant may elect not to deal with companies doing business in South Africa, the City too may make the same choice unhindered by the constraints of the Commerce Clause." P. App. at D-71.

Petitioners' reliance on *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984) is misplaced. *Wunnicke* involved a state requirement that any buyer of state timber also process the timber within the state. The requirement was struck down as constituting a regulatory attempt to control the separate timber processing market after the timber was sold; the state was not merely acting as a market participant by selling, but was regulating timber processing that occurred after the State's own market transaction.

B. Even if the Market Participant Doctrine Were Not Applicable, the Ordinances Would Not Violate the Interstate Commerce Clause.

The Ordinances pass muster under the Commerce Clause pursuant to the criteria set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), as elaborated in *Maine v. Taylor*, 477 U.S. 131 (1986). Any effect of the Ordinances on interstate commerce is incidental, and they in no wise discriminate against interstate commerce. *Maine v. Taylor*, 477 U.S. at 138. The Ordinances

evenhandedly effectuate legitimate local public interests; and the Maryland Court of Appeals correctly affirmed the trial court's finding that any burden on interstate commerce caused by the Ordinances is certainly not "clearly excessive" in relation to the City's legitimate local interest. P. App. at D-81.

The fact that the Trustees will not buy or hold securities of certain corporations is not a cognizable burden on interstate commerce. The Commerce Clause does not protect particular interstate firms but rather the interstate market. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). The interstate market is not affected by the Ordinances: "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.* The pension funds will have no difficulty in making alternative investments. P. App. at D-33.

Any minimal burden on interstate commerce is not excessive in relation to the City's legitimate local interests as identified by the Maryland Court of Appeals and above discussed.

III. The Ordinances Are Not Preempted by Federal Statute or Regulations.

The Ordinances are not preempted by federal law under any of the three bases of preemption recognized by this Court, namely: (1) that a federal statute expressly provides for preemption, (2) that Congress has occupied an entire field of regulatory activity or (3) that state or local legislation actually conflicts with a federal statute or regulation. See *Michigan Cannery & Freezers v. Agricultural Board*, 467 U.S. 461, 469 (1983) (federal preemption under Supremacy Clause of state agricultural act).

Petitioners' preemption argument is based essentially on the Comprehensive Anti-Apartheid Act of 1986 (the "Act" or "CAAA"), 22 U.S.C. § 5001, *et. seq.* In fact, the structure of the Act, and congressional statements and actions at the time of passage of the Act, including a resolution of the House of Representatives passed contemporaneously, make clear that Congress not only had no desire to preempt local and state SA divestment legislation, but actually had every intention of permitting such legislation to supplement the CAAA. In no event can Congress be fairly said to have occupied the field. Nor is there such a conflict between federal laws or regulations and the Ordinances as to give rise to preemption.

A. No Federal Statute Expressly or Impliedly Preempts the Ordinances.

Petitioners admit, Petition at 22, that the Act itself contains no language that would expressly preempt the Ordinances. The only preemptive language in the Act is found in Section 606, 22 U.S.C. § 5116, in which the preemptive effect, as the Court of Appeals of Maryland recognized, "is limited to state or local procurement legislation which, as applied, might cause a federally funded contract not to be awarded to the lowest bidder." P. App. at D-51. This limited preemptive provision indicates that Congress' attention was directed to the question of preemption and that, so far the CAAA was concerned, when Congress intended to preempt, it said so. This conclusion is reinforced by the fact that Congress was fully aware of the existence of state and local divestment legislation.¹⁵ *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413-14 (1973) (no preemption where Congress aware of state legislation and does not unambiguously express intent to preempt). It is further buttressed by the rule stated in *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 540 (1979), that with respect to laws "deeply rooted in local feeling and responsibility, in the absence of compelling congressional direction, we should not infer that Congress has deprived the States of the power to act."

The instant case involves a stronger indication of congressional intent than mere absence of express language of preemption. House Resolution 549 (1986), passed at the same time as the CAAA, declared affirmatively that the House intended that the CAAA not preempt even legislation with far more bite than

¹⁵See, e.g., 132 Cong. Rec. S9306 (July 17, 1986) (remarks of Senator Moynihan) ("[S]tates and localities should have the right to make their own decisions regarding their own individual involvement with the South African regime."); 132 Cong. Rec. S12533 (Sept. 15, 1986) (remarks of Senator Kennedy).

Additionally, in 1984 the Congress rejected a resolution to exercise its power to disapprove, pursuant to its plenary powers over the District of Columbia, the divestment ordinances of the District of Columbia Council. See Hearing and Markups Before the Subcommittee on Fiscal Affairs and Health of the Committee on the District of Columbia, House of Representatives, 99th Cong., 2nd Sess. on H. Con. Res. 216; H. Res. 372.

the Ordinances considered here.¹⁶ When Representative Wheat introduced the Senate-passed bill that became the CAAA along with House Resolution 549, he said:

... [I]t is not the intent of this body to pass any legislation which grants any new constitutional authority. It is merely our intent to make it clear that *this legislation does not impact upon the authority that the States and local governments already have.*

132 Cong. Rec. H6767 (Sept. 12, 1986) (emphasis supplied).

B. No Congressional Legislation Occupies the Field.

In light of the foregoing facts, Petitioners' argument that the CAAA "occupies the field", Petition at 23, "leaving no room", Petition at 22, for the Ordinances, has no substance. Petitioners make much of the word "Comprehensive" in the Act's title. The preamble and the text of the Act itself, however, indicate that Congress intended the Act to be "comprehensive" only to the extent of the federal government's own actions relating to South Africa. Thus, for example, all of the provisions dealing with government procurement refer solely to the "United States Government", see CAAA §§ 1314 & 1316, 22 U.S.C. §§ 5064 & 5066, and do not address the subject of investment by local government in securities of SA companies. As this Court said in *Hillsborough County, Fla. v. Auto. Med. Labs*, 471 U.S. 707 (1985):

... [M]erely because the federal provisions were sufficiently comprehensive to meet the needs identified by Congress does not mean that states and localities were barred from identifying additional needs or imposing further requirements in the field. . . .

¹⁶The resolution stated:

Section 2. Upon the adoption of the motion provided for in Section 1, the House shall be considered to have adopted a House resolution containing the text: "Resolved, that in passing the bill, H.R. 4969, as amended by the Senate, it is not the intent of the House of Representatives that the bill limit, preempt, or affect, in any fashion, the authority of any state or local government or of the District of Columbia or of any commonwealth or any territory or possession of the United States or political subdivision thereof to restrict or otherwise regulate any financial or commercial activity in South Africa." (Emphasis supplied).

See also *DeCanas v. Bica*, 424 U.S. 351, 359-60 (1976) (to the same effect, in a foreign relations power case); *New York State Department of Social Services v. Dublino*, 413 U.S. at 415 (preemption not to be inferred merely from comprehensive character of federal statute, because modern social and regulatory legislation often by its very nature requires intricate and complex responses from Congress); cf. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 187-88 (1983) (that a course of action neither requiring nor prohibiting certain measures might be preferred on the federal level does not establish intent to preempt the right of states and localities to make their own choice as to whether to employ those measures themselves).

C. The Ordinances Are Not Preempted by Conflict or Inconsistency With Federal Law or Policy.

Preemption by reason of conflict with federal statute or regulation requires either that there be "a physical impossibility" of "compliance with both federal and state regulations", or that the state law constitute "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County, Fla. v. Auto. Med. Labs*, 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Only when the local legislation authorizes conduct that the federal law forbids, or *vice versa* is there a conflict giving rise to preemption. *Michigan Cannery & Freezers*, 467 U.S. at 478. There is no such conflict—or indeed any conflict at all—here. The CAAA does not limit public or private bodies in connection with divestment of securities of SA companies. It prohibits outright certain activities, e.g., new investment by American companies in South Africa, and certain imports from and exports to South Africa. It neither requires any company to continue doing business in South Africa nor prohibits any company from continuing to do so. It does require those American companies that choose to remain in South Africa to adhere, at a minimum, to certain standards known as the "Sullivan principles". It neither requires nor prohibits divestment by anyone. Compliance with both the CAAA and the Ordinances presents no "physical impossibility"; nor do the

Ordinances stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Act.¹⁷

IV. The Ordinances Do Not Contravene the Foreign Relations Power or the Foreign Commerce Clause of the Federal Constitution.

A. The Ordinances Do Not Infringe the Federal Foreign Relations Power.

Petitioners' "foreign relations power" argument, like their other arguments, suffers from the basic flaw of being premised on a misstatement of the Ordinances' nature, force and effect. The law in this area is bounded by two cases: *Clark v. Allen*, 331 U.S. 503 (1947) (no infringement) and *Zschernig v. Miller*, 389 U.S. 429 (1968), *reh'g denied*, 390 U.S. 974 (1968) (infringement). *Zschernig* is the only case decided by this Court invalidating a state action not violative of a federal statute, treaty or executive agreement. *Cf. United States v. Pink*, 315 U.S. 203 (1942) (U.S.-Soviet treaty); *Hines v. Davidowitz*, 312 U.S. at 67 (federal law on aliens); see also Note, *The Supreme Court 1967 Term*, 82 HARV. L. REV. 63, 245 (1968). The instant case is far over on the *Clark v. Allen* side of the line; the Ordinances are even less intrusive than the state statute in *Clark v. Allen* upheld by this Court.

¹⁷Petitioners' quotation of Reagan administration officials on the policy of "constructive engagement", Petition at 24 & n.7, is no basis for arguing preemption. Such general expressions by executive appointees preempt nothing. The only conflict that can preempt is conflict with a specific federal statute. See *International Paper Company v. Ouellette*, 479 U.S. 481 (1987); *Hillsborough County, Fla. v. Auto. Med. Labs*, 471 U.S. 707 (1985) (federal regulations); *Pacific Gas & Electric v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 220-22 (1983) ("national policy" to promote commercial use of nuclear power did not preempt traditional state utility regulation); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 129-34 (1978) ("national policy" in favor of competition did not preempt state requirement that oil companies get out of service station business where that requirement was not in conflict with any federal statute); Madison, *The Federalist No. 51* ("In government, the legislative authority necessarily predominates"). If the pronouncements relied on by Petitioners ever had any force, the subsequent enactment of the CAAA has sapped that force and repudiated "constructive engagement" by applying sanctions on a nationwide basis.

Traditionally, there has been a substantial body of valid state and local law "that involves matters of significant concern to foreign relations." Restatement (Second) of Foreign Relations Law §2(1) (c). Comment *d* to the Restatement, Section 2, states:

Relation between federal and state law. The Foreign Relations Law of the United States is not confined to federal law. The domestic law referred to in this Section includes the law of the several states of the United States. Where the Constitution does not vest exclusive jurisdiction in the federal government, and where Congress has not acted to "occupy the field," a state may prescribe and enforce rules of law involving matters of significant concern to foreign relations.

Thus, state courts traditionally examine judicial proceedings of foreign countries to determine whether to enforce a foreign judgment, and may refuse to enforce any foreign law that offends the forum's public policy. See *Bond v. Hume*, 243 U.S. 15, 21 (1970) (state need not enforce contract founded upon foreign law "where to do so would be repugnant to good morals"); *United States v. Pink*, 315 U.S. at 230-31 (in absence of contrary federal law or treaty, states may refuse to enforce rights based on foreign law which runs counter to the public policy of the forum); *Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975), *cert. denied*, 423 U.S. 866 (1975) (confiscation by Uganda not recognized as defense); Uniform Foreign Money Judgment Recovery Act §4(a) (1) (judgments not recognized if "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law").

Clark v. Allen, 331 U.S. 503 (1947), held that a state may condition the right of foreign nationals to inherit property on the reciprocal grant by the foreign country of the same right to U.S. citizens. After noting that rights of succession to property are essentially matters of local law and that there was no applicable conflicting federal treaty or policy, as there was in *Hines v. Davidowitz*, 312 U.S. 52 (1941) (upon which Petitioners rely), the Court said in *Clark*, 331 U.S. at 517:

Nor has California entered the forbidden domain of negotiating with a foreign country, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316, 317, . . .

or making a compact with it contrary to the prohibition of Article 1, Section 10 of the Constitution. What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.

Zschernig, on the other hand, involved an Oregon statute escheating the inheritance claims of a non-resident alien if the alien's country of origin did not give a reciprocal right of inheritance to U.S. citizens, or if the alien's inheritance would be subject to "confiscation" by the foreign government. The Court struck the statute down, noting that Oregon, in applying its statute, passed judgment on, *inter alia*, the relationship between foreign countries and their nationals, the *bona fides* of representations of fact by foreign nations, and the credibility of foreign officials. The Court expressly pointed out that statutes of this kind had in fact provoked foreign protest. *Zschernig*, 389 U.S. at 347 n.7. The Court concluded that the application of the statute "affects international relations in a persistent and subtle way", 389 U.S. at 440, and permits the "state, speaking through its probate courts to establish its own foreign policy." 389 U.S. at 441.

Zschernig explicitly acknowledged the correctness of *Clark v. Allen*, and distinguished it on the basis that the *Zschernig* statute represented a much more vigorous intrusion into foreign affairs than the California statute.

The Maryland Court of Appeals in the instant case affirmed the trial court's application of the teachings of this Court's cases. The courts below spelled out the absence here of the intrusive features that were the bases for the holding in *Zschernig*. Unlike the statute in *Zschernig*, the Ordinances here "represent 'a single general decision'" by the City, P. App. at D-61, and require no case-by-case investigation or assessment of, or commentary on, the laws or operations of any foreign government by local government officials or employees. P. App. at E-13-14. Unlike *Zschernig*, which involved the exercise of "a state's regulatory power"; the Ordinances here "involve[d] the exercise of a local government's proprietary power." *Id.* at E-14. Unlike *Zschernig*, where the statute operated directly on foreign nationals, the Ordinances operate directly only on the Trustees. *Id.* at E-15. The effect of the Ordinances on South Africa is indirect, minimal, and less than a featherweight when compared to the direct sanctions enacted by Congress in the CAAA, with which the Ordinances operate not in conflict but in tandem.

Cases after *Zschernig* have established that *Zschernig* is a precedent of limited force and the product of a particular period in the Cold War. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 197 (1983), this Court upheld a California franchise tax on a multinational corporation. The tax was based on the unitary business concept reflecting payroll, property and sales of the taxpayer's foreign subsidiaries. The Court found that the tax, with its possibility of double taxation (which actually occurred in that case) and the possibility of foreign retaliation have "foreign resonances but do not implicate foreign affairs." 463 U.S. at 194. The Court reasoned, *inter alia*, that (a) the threat of retaliation was not "significant", *id.*, and (b) the tax was imposed, not on a foreign entity but on a domestic corporation", *id.* at 195, although income arguably attributable to foreign corporations was "counted" in calculating the taxable income of the domestic corporation. *Id.*

Again, *Reeves, Inc. v. Stake*, 447 U.S. 429, 445 (1980) cited with approval *K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), which upheld New Jersey's "Buy-American" statute requiring state government agencies to purchase only American-made products. Also, in *DeCanas v. Bica*, 424 U.S. 351 (1976), this Court, without even citing *Zschernig*, upheld state regulation of the employment of foreign nationals, pointing out that even if "local regulation has some purely speculative and indirect impact" on foreign affairs, "it does not thereby become a constitutionally proscribed regulation." 424 U.S. at 355-56.

Finally, in *Gorun v. Fall*, 393 U.S. 398 (1969), this Court summarily affirmed the decision of a three-judge district court, *Gorun v. Fall*, 287 F. Supp. 725 (D. Mont. 1968), which dismissed a complaint attacking a Montana reciprocal inheritance statute that conditioned the inheritance rights of Romanian nationals on a showing that Romania allowed United States citizens to receive, and enjoy in the United States, property bequeathed in Romania. The Court declined to invalidate the statute, because *Zschernig* provided guidelines for the Montana court to "fashion a procedure for applying . . . [the Montana statute] in a manner not offensive to the federal Constitution." 287 F. Supp. at 728. The district court correctly perceived that what made the Oregon statute in *Zschernig* invalid was the way it was administered. *Gorun* is dispositive here, and in the event this Court is disposed to grant certiorari, this Court's disposition of the instant case should be the same as its disposition of *Gorun*.

Interestingly, none of the foreign relations power cases decided by this Court after *Zschemig* is even mentioned in the Petition. The state cases relied upon by Petitioners are inapposite because they involve regulation, taxation or direct denial of rights of foreign and/or American nationals.¹⁸

B. The Ordinances Do Not Contravene the Foreign Commerce Clause.

The U.S. Constitution, art. I, § 8, cl. 3 provides that "the Congress shall have power . . . to *regulate* commerce with Foreign Nations. . . ." (Emphasis supplied). This clause bars state laws that "prevent . . . the federal government from speaking with one voice when *regulating* commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (emphasis supplied). The short answer to Petitioners' argument is that the Ordinances do not regulate, or even purport to regulate, any aspect of foreign commerce. They merely govern the investment of City funds.¹⁹

Even if the Ordinances could be said to regulate foreign commerce, and regardless of how rigorous the scrutiny to which they are subjected, they would survive review under the standards set forth by this Court.

The two leading cases on the Foreign Commerce Clause are *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) and *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983). Both cases involved state taxes that implicated foreign commerce. In *Japan Line*, this Court invalidated a California tax that fell on a Japanese vessel engaged entirely in foreign commerce even though the tax was formulated on the basis of the vessel's contacts with California ports. The tax conflicted with a treaty

¹⁸*Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 503 N.E.2d 300 (1986) (discriminatory use tax on South African coins); *New York Times Co. v. City of New York Comm'n on Human Rights*, 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963 (1977) (prohibition of advertisement in New York of employment opportunities in South Africa).

¹⁹The questions raised in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) and in *South Central Timber Development Co. v. Wunnicke*, 467 U.S. 82, 96 (1984) as to whether the market participant doctrine applies to foreign as well as interstate commerce, and whether laws regulating foreign commerce are subject to "more rigorous" scrutiny than laws regulating interstate commerce are irrelevant because the Ordinances do not regulate commerce at all.

between the United States and Japan and thus prevented this country from "speaking with one voice" in the regulation of foreign commerce. *Japan Line*, 441 U.S. at 453. By comparison, in *Container Corp.*, this Court upheld a franchise tax imposed on a Delaware corporation engaged in domestic and foreign commerce. The Court distinguished *Container Corp.* from *Japan Line* on the basis that *Container Corp.* involved a tax on a domestic corporation, with only indirect and speculative effects on foreign commerce, whereas the tax in *Japan Line* was applied directly to a foreign national corporation and contravened a federal treaty.

The Maryland Court of Appeals correctly concluded that the instant case is closer to *Container Corp.* than to *Japan Line*. In fact, the state tax upheld in *Container Corp.*, as attenuated and speculative as this Court found its effect on foreign relations to be, was far more intrusive than the Ordinances challenged here by Petitioners.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. In the alternative, should this Court issue the Writ, Respondent suggests that the issues raised by the Petition are appropriate for summary disposition, and urges summary affirmance of the decision of the Maryland Court of Appeals.

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APPENDIX A

CHARTER OF BALTIMORE CITY

ARTICLE II

Art. II, § 1

GENERAL POWERS

The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:

* * *

(24) PENSIONS.

(a) To establish and maintain a general system of pensions and retirement benefits for the officers and employees of the City, the Police Department of Baltimore City, the Enoch Pratt Free Library, the Walters Art Gallery, the Baltimore Museum of Art, the Municipal Museum of Baltimore City, and the officers and employees, by whatever authority appointed, whose compensation is paid by the City; to fix the terms of and restrictions on admission to such system and the classifications therein; to provide for the separate maintenance, or inclusion in such general pension system, of any existing pension system (with the consent of a majority of its participants) for officers and employees, by whatever authority appointed, whose compensation is paid by the City; to provide that persons eligible for admission in such general pension system shall not be eligible, except as hereinafter provided, for admission to any other pension system, the revenues of which are derived wholly or in part from appropriations made by the City, from license fees or from fines and forfeitures imposed under laws or ordinances in force in Baltimore City; to provide, in connec-

tion with such general pension system, a system of benefits payable to the beneficiaries and dependents of any participant in such general pension system after the death of such participant (whether accidental or otherwise and/or whether occurring in the actual performance of duty or otherwise, subject to such exceptions, conditions, restrictions and classifications as may be provided by ordinance; provided, however, (1) that upon the adoption of an ordinance providing for their participation in the general pension system, officers and employees of said Police Department who do not elect to participate in such general pension system shall be entitled to pensions, benefits or allowances for themselves, their widows or dependents, under laws or ordinances in force immediately prior to the adoption of such ordinance; and (2) that nothing in this subsection shall operate or be construed to diminish in any way the rights of any members of the Fire Department who are not participants in the presently existing general pension system of the City, their widows or dependents, to pensions, benefits or allowances provided for by laws or ordinances in force as of January 1, 1926.

(a-1) To establish and maintain a separate system of pension and retirement benefits for elected officials of Baltimore City; to fix the terms of and restrictions on admission to that system and the classifications therein; to provide that persons eligible for admission in that pension system shall not be eligible to receive credit for the same years of service for which they received credit in any other pension system supported wholly or in part by the City of Baltimore or State of Maryland; to provide for the optional transfer to that pension system of any elected official who is eligible to join it, from any other system of pensions and retirement benefits operated and maintained by the Mayor and City Council of Baltimore; to provide in connection with that pension system, benefits payable to the beneficiaries and dependents of any participant in that pension system after death of that participant (whether accidental or otherwise occurring in the actual performance of duty or otherwise), subject to any exceptions, restrictions and classifications that may be provided by ordinance; provided, however, that upon the adoption of an ordinance providing for

their participation in that pension system, eligible elected officials who do not elect to participate in that pension system, shall be entitled to the pensions, retirement benefits and other benefits or allowances, for themselves, their widows and dependents, under the laws or ordinances in force immediately prior to the adoption of that ordinance.

(b) To establish and maintain a new system of pensions and retirement benefits applicable to all future entrants into the service of the City of Baltimore, whose entrance therein occurs after the establishment of such new system who desire to be covered by the provisions of the Federal Social Security Act and who are not specifically excluded therefrom may elect to enter such new system, during which members of the existing system may transfer to such new system; to provide for the transfer to such new system of the reserves held in the existing system on account of members who so transfer; provided, however, that the benefits of any member of the existing system shall not be changed by reason of his coverage under Social Security without his consent; and provided further that except as this paragraph specifically provides otherwise, and except where inconsistent herewith, the provisions of paragraph (a) of this subsection (24) concerning the existing system shall apply to such new system.

(c) Until amended by ordinance, the presently existing pension system of the City shall remain in force. (Ch. 702, 1982 Acts of the General Assembly)

(25) PENSIONS FOR SCHOOL CAFETERIA EMPLOYEES. To grant to any and all persons regularly employed in, or associated with, any cafeteria system or department operated in connection with the public school system of the Mayor and City Council of Baltimore, such of the benefits and advantages of the Employees' Retirement System of the City of Baltimore, established by Ordinance No. 553, approved February 1, 1926, and amendments thereto, as the Mayor and City Council of Baltimore may by ordinance provide, except the the Retirement System shall not be liable for the payment of any any pensions or other benefits on account of said persons, for

which reserves have not been previously created from funds contributed specifically for such benefits by the City or said persons. Provided, that any ordinance passed under authority of this paragraph may provide that every such person shall be entitled to credit for all service rendered prior to January 1, 1926, and for one half of all service rendered between January 1, 1926, and the date of admission of the said Employees' Retirement System; provided, further, that any ordinance passed under authority hereof shall provide that any such person who shall become employed in, or associated with, any such cafeteria system or department after the passage of said ordinance shall, before becoming a member of the said Employees' Retirement System of the City of Baltimore, first submit to a medical examination similar to that required for employees in the Classified Service of the City of Baltimore.

(26) PENSIONS FOR POLICEMEN AND FIREMEN. To establish and maintain a separate system of pensions and retirement benefits for such officers and employees of the Department of Aviation, of the Police Department and of the Fire Department of Baltimore City as may be designated or described by Ordinance of the Mayor and City Council of Baltimore; to fix the terms of and restrictions on admission to such system and the classifications therein; to provide that persons eligible for admission in such pension system shall not be eligible except as hereinafter provided for admission to any other pension system, the revenues of which are derived wholly or in part from appropriations made by the City, from license fees or from fines and forfeitures imposed under the laws or ordinances in force in Baltimore City; to provide for the optional transfer to such pension system of any officer or employee of either the Department of Aviation, the Police Department or the Fire Department of Baltimore City who is eligible to join such separate pension system, from any other system of pensions and retirement benefits operated and maintained by the Mayor and City Council of Baltimore; to provide in connection with such pension system, a system of benefits payable to the beneficiaries and dependents of any participant in such pension system after the death of such participant (whether accidental or otherwise and/or whether occurring in the actual

performance of duty or otherwise), subject to such exceptions, conditions, restrictions and classifications as may be provided by ordinance; provided, however, (1) that upon the adoption of an ordinance providing for their participation in such pension system, eligible officers and employees of the Department of Aviation, of the Police Department and of the Fire Department who do not elect to participate in such pension system, shall be entitled to the pensions, retirement benefits, other benefits or allowances for themselves, their widows or dependents, under the laws or ordinances in force immediately prior to the adoption of such ordinance; (2) nothing in this subsection shall operate or be construed to diminish in any way the rights of any eligible members of the Police Department or of the Fire Department who are not participants in the presently existing general pension system of the City of Baltimore, their widows or dependents, to pensions, retirement benefits, other benefits or allowances provided for by laws or ordinances in force as of January 1, 1926. Until amended by ordinance, the presently existing pension and retirement systems of the City shall remain in force. The provisions of this subsection shall be deemed to be in addition to and not in substitution of any other powers or authorizations now conferred upon the Mayor and City Council of Baltimore.

[1964 Revision]

APPENDIX B

BALTIMORE CITY CODE

ARTICLE 22

RETIREMENT SYSTEMS

* * * *

7. Management of funds.

(a) Trustee of funds.

The Board of Trustees shall be the trustees of the several funds of the Employees' Retirement System of Baltimore created by Article 22 under this subtitle as provided in Section 8. The Board of Trustees shall have the power to invest and reinvest such funds in the following types or classes of assets subject to the limitations, if any, as set forth with regard to each type or class of investment.

* * *

(1) Deposits in savings accounts, or other evidences of deposit in national or state banks and trust companies. To the extent that such an investment or account is insured by the Federal Savings and Loan Insurance Corporation, or by the Maryland Savings Share Insurance Corporation, said Trustees may invest in shares of savings and loan associations or building and loan associations in the State of Maryland.

(2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by Canada, and obligations of the International Bank for Reconstruction and Development and obligations of the Inter-American Development Bank.

(3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or

of any province of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America, or any Canadian municipality.

(4) Interest-bearing bonds on any commission, instrumentality, authority or political subdivision having legal authority to issue the same of the the United States of America, Canada, any state, District of Columbia, territory or possession of the United States of America or of any province of Canada, or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America or of any province of Canada.

(5) Interest-bearing bonds, notes or other interest-bearing obligations of any corporation organized under the laws of the United States of America or of Canada or province thereof, or under the laws of any state, District of Columbia, territory or possession of the United States of America. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation or other equipment wholly or in part within the United States of America or Canada with a right to receive determined portions of rental, purchase price or other fixed obligatory payments for the use or purchase of such transportation or other equipment.

(6) Publicly-traded preferred or common stock or shares of any corporation created or existing under the laws of the United States of America, Canada or province thereof, or of any state, District of Columbia, territory or possession of the United States of America; provided however, that such investments in stock shall not exceed fifty percent (50%) of the total market value of all the assets of the funds of the Employees' Retirement System referred to herein. An evaluation of the total assets of the Retirement System shall be made at least once in every three (3) months, for the purposes of maintaining this fifty percent (50%) limitation.

(7) Covered call options may be sold by the Employees' Retirement System when the underlying common stock is held in the equity portfolio and when such options are actively

traded on a public exchange, provided, however, that options are not sold on more than twenty-five percent (25%) of the total market value of common stocks held in the portfolio. Purchase of options will be permitted only when closing out a previously written covered call option.

* * *

(8)(i) Loans secured by first mortgages, or deeds of trust, or unencumbered fee-simple or improved leasehold real estate in the District of Columbia or in any state of the United States of America or province of Canada. Whenever such loans are made upon fee-simple, or leasehold real estate which is improved by a building or buildings, the said improvements shall be incurred against loss by fire and such other casualties as are included in extended coverage policies, and the said insurance policies shall contain the New York or Massachusetts standard mortgage clause or one equivalent thereto and shall be delivered to the mortgagee as additional security for the said loans. Bonds, notes, or other evidence of indebtedness secured by mortgages or deeds of trust which are guaranteed or insured by an instrumentality of the United States pursuant to acts of Congress, as heretofore and hereafter amended, known as the National Housing Act, Servicemen's Readjustment Act of 1944, and Bankhead-Jones Farm Tenant Act; and neither the limitations of this section nor any other law of this State requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured or guaranteed mortgage loans. Provided, however, that such investments in mortgages shall not exceed twenty-five percent (25%) of the total market value of all the assets of the funds of the Employees' Retirement System referred to herein and evaluation of the total assets of the Retirement System shall be made at least once in every three (3) months, for the purpose of maintaining this twenty-five percent (25%) limitation. Upon a foreclosure of its own mortgages or an acceptance of a deed in lieu of foreclosure by the Trustees, the said Trustee shall have the right to purchase, hold, operate, lease, manage and/or sell the subject real estate.

(ii) Open and closed-end real estate investment pools, direct real estate investments, and unrestricted mortgage investments with equity participation. Such investments shall be included in the twenty-five percent (25%) restriction of market value of assets provided for in Section 7(a)(8)(i), with the further limitation that these investments shall not exceed ten percent (10%) of the market value of all the assets of the Retirement System Funds.

Provided, however, if any such investment is in the nature of a "real estate investment pool," as defined hereinafter, then such investment shall be subject to the following restrictions:

1. With the exception of an insurance company, the investment manager shall either be registered as an investment advisor or function through an investment advisor registered with the Securities Exchange Commission under the Investment Advisors Act of 1940.

2. With the exception of an insurance company, all funds of the real estate investment pool shall be held in a trust wherein the investment manager, trustees, and all persons or entities responsible for the management, control, custody, maintenance, or investment of the funds, or having any similar responsibility in the pool, shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

3. If the investment is in a insurance company's real estate investment pool, the insurance company shall have the highest rating of A.M. Best Co., and all persons or entities responsible for the management, control, custody, maintenance or investment of the funds, or having any similar responsibility, shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

4. The trust agreement shall be tax exempt under the applicable provisions of the Internal Revenue Code, Sections 401 and 501(a) or subsequent amendments or revisions thereto. In the case of insurance company pools, the pools shall satisfy the applicable requirements of the Internal Revenue Code, as amended, so that the insurance company does not pay

federal income tax on the earnings of the separate accounts of such pools.

5. The trust funds of the real estate investment pool shall be immune from suit, and exempt from attachment by any creditors of any person, corporation or other entity that is responsible for the management, custody, control, maintenance, or investment of the funds, or having any similar responsibility in said pool, under any local, state, or federal law. Title to all assets of a separate account of an insurance company's real estate investment pool shall be held solely in the corporation name of the insurance company itself, and under applicable law such assets shall not be chargeable with liabilities arising out of any other business which the insurance company may conduct.

6. The real estate investment pool trust or any other agreement for such investment shall not violate the provisions of Internal Revenue Code Sections 401 and 501(a) or any subsequent revisions or amendments thereto, under which the Employees' Retirement System is qualified.

7. All unit holders or qualified investors in such a pool shall be pension or employee benefit plans or trusts qualified under Internal Revenue Code, Section(s) 401 and/or 501(a), or a governmental plan under Sections 414(d) and/or 818(a)(6).

8. For the purposes of this section, a real estate investment pool shall mean any investment wherein the Retirement System places certain funds into a commingled trust, or a commingled separate account of a life insurance company, and wherein the trust or insurance company utilizes said funds to make certain real estate investments in the District of Columbia, or in any state of the United States of America or province of Canada, and wherein each investor owns through units a certain equity in the investments.

(9) Ground rent in the State of Maryland.

(10) Interest, rents or other fixed income due and accrued on any of the investments authorized in the preceding subsections.

The Board of Trustees shall have the duty and responsibility of periodically determining investment policies consistent with the above limitations, the capital market environment, and the actuarial characteristics of the Employees' Retirement System and to publish such investment policy guidelines by filing a copy thereof with the Department of Legislative Reference of Baltimore City, and after January 1, 1979, also by publication in the Municipal Journal.

All contributions from time to time paid into the several funds, and the income thereof, without distinction between principal and income, shall be held and administered by the Board of Trustees or its agents in the funds, and the Board shall not be required to segregate or invest separately any portion of the funds.

Provided, however, that nothing in this amendatory ordinance shall be deemed to render illegal or to invalidate the making and holding of any investment heretofore made and now remaining in said funds where such investment when made was authorized by law prior to the enactment of this amendatory ordinance; and provided further, that nothing herein shall be deemed to prevent the Board of Trustees from accepting, in lieu or substitution of securities representing investments heretofore validly made, other securities not of the kind enumerated but authorized by ordinance as investments for the said Board prior to the enactment of this amendatory ordinance, where the Board shall deem such substitution of securities desirable to preserve the investment of the funds.

Subject to the terms, provisions and conditions contained herein, said Trustees shall have full power to hold, purchase, sell, assign, transfer, and dispose of any of the securities and investments in which any of the funds created herein

shall have been invested, as well as the proceeds of said investments and any moneys belonging to said funds.

(11) Short Term Investment Funds established, operated and maintained by the contract custodian of the assets of the Employees' Retirement System, for the collective investment and re-investment of funds received and held by it as Trustee, Co-Trustee, or in any other fiduciary capacity described in Subtitle 5 of Title 3 of the Financial Institutions Article of the Annotated Code of Maryland (1980 Volume), or any amendment, supplement, or successor thereto or recodification thereof, which Short Term Investment Fund has been qualified under the provisions of Section 401(a) and exempt from Federal income taxation under Section 501(a) of the Internal Revenue Code of 1954, as amended, and which is used as a temporary investment/cash management vehicle; provided that investment in such Short Term Investment Fund may be made from uninvested cash reserves held by the contract custodian, or from funds designated by the Investment Managers of the Employees' Retirement System funds. In connection with the participation of the Employees' Retirement System in Short Term Investment Fund, where required by law or the terms of the Short Term Investment Fund, the Declaration of Trust establishing such Short Term Investment Fund is hereby adopted and made a part of the Employees' Retirement System to the extent such instrument does not violate the Internal Revenue Code or other applicable law and does not affect the tax qualification of the Employees' Retirement System, and any funds of such System invested in the Short Term Investment Fund shall be subject to all the provisions thereof, as the same may be amended from time to time.

(12) Asset Lending of securities which are under the custody of the contract custodian of the assets of the Employees' Retirement System, provided that: (i) such securities are loaned in accordance with the procedures set forth in the Department of Labor Prohibited Transaction Exemption 81-6 Ruling (PTE 81-6), or applicable successor regulations; (ii) the Board of Trustees shall approve or authorize the designated Investment Managers to approve the securities to be loaned,

the brokers to whom such securities are loaned, and the collateral to secure assets loaned; and provided further, that before any such assets are loaned, the Board of Trustees and the Director of Finance shall, pursuant to PTE 81-6 procedures enter into a master loan agreement with the contract custodian setting forth the procedures to be followed; the broker to whom such securities will be loaned; collateral arrangements; fees; and other applicable prior to execution by the Board of Trustees, by the Director of Finance as the designated custodian of the assets of the Employees' Retirement System, by the City Solicitor and the Board of Estimates; provided, however, that the market value of securities loaned shall not exceed twenty-five percent (25%) of the total market value of all assets of the Employees' Retirement System on any day.

* * *

(13)¹ (i) On the first day of the third quarter of fiscal year 1987, no monies or funds held under any provisions of the Retirement System shall remain invested or hereinafter be invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia, or to a national corporation of the Republic of South Africa or Namibia, or in the stocks, securities, or other obligations of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary or affiliate does business in or with the Republic of South Africa or Namibia.

¹Sections 2 and 3 of Ord. 765, 1986 provide as follows:

"Sec. 2. And be it further ordained,

(a) That, subject to the provisions of this section, the divestiture required by Section 1 of this ordinance shall be completed with the time limit established in this ordinance.

(b) That the time limit shall begin on the first day of the third quarter of fiscal year 1987.

(c) That during the time limit the Board of Trustees of the retirement systems shall make quarterly reports to the Mayor and City Council concerning the progress of divestiture.

(d) That, during the time limit, the Board of Trustees of the retirement systems may from time to time suspend the divestiture program provided the suspending Board adopts a resolution pursuant to this section.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the African Fund entitled "Unified List of United States Companies with Investments or Loans in South Africa and Namibia".

(iii) Business entities doing business in or with the Republic of Namibia shall be identified through correspondence with the United Nations' Office of the Commissioner for Namibia and the United Nations' Center for Transnational Corporations.

(b) Interest. As of July 1, 1978, the Trustees will determine the "carrying value" of the Fund in accordance with the asset valuation method theretofore employed and the "adjusted market value" of the Fund representing an average fair market value of that date.

During the 1979 fiscal year, the Trustees will establish a "Reserve for Book Value" as of July 1, 1978, equal to the difference as of that date between the carrying value and the

(e) That when a Board of Trustees of either retirement system adopts a resolution suspending the divestiture program under this section, the suspending Board shall find as follows:

(1) That the rate of return on the funds are substantially lower than the average of the annual earnings on the funds over the past five years, and

(2) That continued divestiture under this ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this ordinance, or

(3) That divestiture under the divestiture program will cause financial losses to the funds.

(f) That when a Board of Trustees of the retirement systems adopts a resolution suspending the divestiture program under this section, the resolution shall:

(1) State the standards and conclusions for the suspension;

(2) Set forth the duration of the suspension and the time of resumption of the divestiture program; however, the period of suspension shall not exceed 90 days and the time limit shall be tolled for the period of suspension; and

(3) Be in writing and shall be sent to the Mayor, President of the City Council, and the Department of Legislative Reference.

Sec. 3. And be it further ordained, That the time limit for divestiture under this ordinance is 2 years."

adjusted market value of the Fund. On that date and on each annual valuation date thereafter, the value of the Fund assets for actuarial valuation purposes will be carried at (1) the then current adjusted market value, plus (2) the Reserve for Book Value.

The Board of Trustees annually shall credit regular interest less the investment management, custodian and investment adviser costs on the mean amount for the preceding year in each of the funds. After payment of pension fund management, custodian, and investment adviser services as provided in Sections 7(g) and 43 (a), any excess of the earnings of the funds of this Retirement System as determined in accordance with an appropriate asset investment adviser services as provided in Sections 7(g) and 43 (a), any excess of the earnings of the funds of this Retirement System as determined in accordance with an appropriate asset valuation method giving effect to actual earnings of the funds, over the earnings based on the regular interest rate used for valuation purposes, shall first be applied by the Board of Trustees to meet the conditions of any asset averaging method then in use under the System.

An additional amount equal to one and one-half percent of the mean amount for the preceding year in each of the funds will be deducted from the remaining excess earnings, if any, and applied by the Board of Trustees to reduce the remaining balance, if any, in the "Reserve for Book Value"; to the extent that excess earnings are less than one and one-half percent per annum, the City of Baltimore shall contribute the difference to the "Reserve for Book Value", averaged over a five year period in accordance with the asset valuation method heretofore employed. The remaining excess earnings, if any, shall next be applied by the Board in such amount or amounts as they determine (1) to decrease the amount contributed by the City of Baltimore, and/or (2) to decrease the period over which the unfunded accrued liability will be amortized as provided in Section 8(c)(3), and/or (3) to reduce the remaining balance, if any, in the "Reserve for Book Value". Any deficiency of the earnings of the funds of this Retirement System, as deter-

mined in accordance with an appropriate asset valuation method giving recognition to actual earnings of the funds, below the required earnings based on the regular interest rate used for valuation purposes shall first be applied to meet the conditions of any asset averaging method then in use under the System; the remaining deficiency in earnings, if any, shall be applied by the Board of Trustees in such amount or amounts as they determine either (1) to increase the amount contributed by the City of Baltimore, and/or (2) to increase the period over which the unfunded accrued liability will be amortized as provided in Section 8(c)(3).

The increase or decrease of contribution and/or the increase or decrease in length of amortization period shall be determined by the Board after receiving the advice of the actuary engaged by the City, on the basis of regular interest rate used for valuation purposes, and of such mortality and other tables as shall be adopted by the Board of Trustees.

The Board of Trustees shall use such portion of the net unallocated interest surplus (if any), which has not been used to reduce the City's contribution or the unfunded actuarial liability, as is deemed necessary by the actuary to cover the cost to the City of Baltimore which may result from the implementation of Ordinance 988, 1987, (City Council Bill No. 1598) effective July 1, 1987 as it affects benefits for current members as of the date of enactment of the ordinance. All other costs of Ordinance 988, 1987, shall be provided for in the same manner as otherwise described in this section.

* * *

(c) Cash on Deposit. For the purpose of meeting disbursements for pensions, annuities, and other payments, there may be kept available cash on deposit in one or more banks or trust companies located in the City of Baltimore, organized under the laws of the State of Maryland or of the United States, in such amount as the Trustees may by resolution from time to time adopt, not exceeding a sum equal to the estimated disbursements projected for a period of fifteen days. The sums on

deposit in bank shall be secured by collateral posted by the depositories of such type and amount as the Commissioners of Finance may prescribe, but in no event shall the market value of such collateral be less than one hundred percent of the amount on deposit according to the depositories' records. In exercising this authority for bank deposits, the Trustees shall endeavor to minimize the amount of such deposits, and shall consider appropriate money management techniques, including wire transfers of funds and the zero-balance-fee-for-service method of maintaining bank accounts. In no event shall the bank accounts be used as the basis for, or form part of the basis for fees for the investment administrators or be used to provide supplementary compensation for such investment administrators.

(d) Securities Handling. The Custodian designated in the Charter of Baltimore City (1964 Revision, as amended) may cause any investment in securities held by the Trustees to be registered in or transferred into the name of the Trustees or into the name of such nominee as the Custodian may direct, including a nominee partnership created by the Board of Trustees, or the Custodian may retain them unregistered and in form permitting transferability, and further may authorize its contractual agents to deposit securities with "clearing corporations" as defined in Section 8-102 of Article 95B of the Annotated Code of Maryland for the express purpose of having such clearing corporations act as centralized depositories for such securities, but the books and records of the Custodian and its contractual agents shall at all times show that all such investments are part of the several funds of the Employees' Retirement System. The authority to make use of a clearing corporation shall include the authority to utilize the "book entry" system of the United States Government, and agencies thereof, for which the Federal Reserve Bank is the authorized fiscal agent.

(e) Conflicts of Interest. Except as otherwise herein provided, no trustee and no employees of the Board of Trustees shall have any direct interest in the gains or profits of any investment made by the Board of Trustees or their designees, nor as such receive any pay or emolument for his services, except as authorized from time to time by the Board of Estimates. No trustee or employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use said gains or profits, except to make such current and necessary payments as are authorized by the Board of Trustees; nor shall any trustee or employee of the Board of Trustees become an endorser or surety or in any manner an obligor for moneys loaned by or borrowed from the Board of Trustees.

(f) Trustee Fiduciary Liability. Neither the Board of Trustees nor any agent, person or other entity acting on behalf of the Board of Trustees shall be liable for the making, retention or sale of any investment or reinvestment made as herein provided, nor for any loss or diminution of the funds, except that due to his or its own gross negligence, wilful misconduct or lack of good faith.

(g) Custodian and Supervision of Funds. The City official designated in the Charter of Baltimore City (1964 Revision, as amended) shall be the custodian of the several funds of the Employees' Retirement System. Supervision of the several funds of the Employees' Retirement System shall be vested in the Board of Trustees. Subject to the approval of the Board of Estimates, the Board of Trustees may hire and appoint such persons, agents or entities (including corporate fiduciaries) as in its discretion may be required or advisable to enable it to perform such pension fund investment management duties hereunder; provided further, that subject to the approval of the Board of Estimates the Board of Trustees may enter into agency and pension fund investment management agreements with one or more qualified pension fund managers for the purpose of obtaining pension fund investment management for the Employees' Retirement System and the several funds thereof. Payment for such investment management services shall be made from the resources of the pension fund or funds.

(h) Prudent Investment of Funds. The Board of Trustees shall discharge its duties, with respect to the investment of the funds of the Employees' Retirement System, solely in the interest of the members and beneficiaries and:

(1) For the exclusive purpose of:

(i) providing benefits to members and beneficiaries; and

(ii) defraying reasonable expenses of administering the Retirement System;

(2) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(3) By diversifying the investments of the Retirement System's funds so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(4) In accordance with the provisions of Section 7 of this subtitle. (Ord. 492, 1985; Ord. 765, 1986; Ord. 779, 1986; Ord. 988, 1987²; Ord. 58, 1988; Ord. 275, 1989).

[1983 Repl. Vol.; 1989 Supp.]

* * * *

²Sections 2 and 3 of Ordinance 988, 1987 provide as follows:

"Sec. 2. And be it further ordained, That notwithstanding the provisions of Section 42 of this Article 22, the provisions and benefits of this Ordinance 988, 1987, shall be repealed or modified by future ordinances, if necessary, in order to comply with Federal law and/or regulations. Such changes may result in the restructuring of the provisions of this ordinance which could result in reduced benefits to members, retirees and/or beneficiaries of retirees.

Sec. 3. And be it further ordained, That this Ordinance shall take effect on July 1, 1987 and shall apply only with respect to members who are employees after June 30, 1987."

(17)(e) Benefit increases to be paid only from Paid Up Benefit Fund and Contingency Reserve Fund.

(i) Any benefit increase provided under this section shall be funded on a single premium paid up annuity basis. The words "Single Premium paid up annuity basis" shall have the common actuarial meaning of spreading the amount available to provide a benefit over the lifetime of an individual in the form of an annuity. It is intended that any such benefit increase shall continue for the lifetime of the eligible member and any beneficiary, consistent with any option elected under Sections 6 or 9. The foregoing Contingency Reserve Fund has been established to insure payment of previously accrued benefit increases for any year in which the Paid Up Benefit Fund does not meet its interest assumption.

(ii) The granting of any benefit increase under this section is contingent on the performance of the retirement system's investment funds. The continuation of any benefit increase previously accrued under this section is specifically made contingent on the ability of the Paid Up Benefit Fund and the Contingency Reserve Fund to provide such benefits in the future. Section 10 and Section 42 to the contrary notwithstanding, any benefit increase provided under this section shall not become an obligation of the City of Baltimore. In the event of any conflict between Section 10 and/or Section 42 and this section, the terms of this section shall prevail.

(iii) If the performance of the retirement system's investment funds cause a decline in the value of the Paid Up Benefit Fund and the Contingency Reserve Fund, with the result that full benefit increases previously accrued under this section cannot be continued, then the trustees shall reduce or eliminate previously accrued increases on an equal percentage basis, effective as of January 1 following the June 30 on which a deficit exists. An equal percentage reduction shall be made to all benefits granted under this Section regardless of when such increases were granted. If the Paid Up Benefit Fund and the Contingency Reserve Fund should become exhausted or decline in value to the point of having no value, previously

accrued increases shall be eliminated in full. Any excess investment earnings available under (c) above in a subsequent year shall be used to provide an increase in benefits without regard to any prior reduction or elimination of benefit increases previously accrued.

[1983 Repl. Vol.]

* * * *

23. Management of funds.

(a) Trustee of funds. The Board of Trustees shall be the trustees of the several funds of the Elected Officials' Retirement System of Baltimore created under the provisions of this subtitle. The Board shall have the power to invest and reinvest such funds as provided for in Section 7 of this Article 22.

(b) The provisions of Section 7(a)(13) of this Article 22, concerning the divestment of funds in firms doing business in or with South Africa or Namibia, shall apply to the several funds of the Elected Officials' Retirement System of Baltimore. (Ord. 1105, 1983; Ord. 792, 1986.)

[1989 Supp.]

* * * *

35. Management of funds.

(a) Trustee of funds. The Board of Trustees shall be the trustees of the several funds of the Fire and Police Employees' Retirement System of Baltimore created by Article 22 under this subtitle as provided in Section 36. The Board of Trustees shall have the power to invest and reinvest such funds in the following types or classes of assets subject to the limitation, if any, as set forth with regard to each type or class of investment.

* * *

(1) Deposits in savings accounts, or other evidences of deposits in national or state banks and trust companies.

To the extent that such an investment or account is insured by the Federal Savings and Loan Insurance Corporation, or by the Maryland Savings Share Insurance Corporation, said Trustees may invest in shares of savings and loan associations or building and loan associations in the State of Maryland.

(2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by Canada, and obligations of the International Bank for Reconstruction and Development and obligations of the Inter-American Development Bank.

(3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America or any Canadian municipality.

(4) Interest-bearing bonds of any commission, instrumentality, authority or political subdivision having legal authority to issue the same, of the United States of America, Canada, any state, District of Columbia, territory or possession of the United States of America or of any province of Canada, or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America or of any province of Canada.

(5) Interest-bearing bonds, notes or other interest-bearing obligations of any corporation organized under the laws of the United States of America or of Canada or province thereof, or under the laws of any state, District of Columbia, territory or possession of the United States of America. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation or other equipment wholly or in part within the United States of America or Canada with a right to receive determined portions of

rental, purchase price or other fixed obligatory payments for the use or purchase of such transportation or other equipment.

(6) Publicly-traded preferred or common stock or shares of any corporation created or existing under the laws of the United States of America, Canada or province thereof, or of any state, District of Columbia, territory or possession of the United States of America; provided, however, that such investments in stocks shall not exceed fifty per cent (50%) of the total market value of all the assets of the funds of the Fire and Police Employees Retirement System referred to herein. An evaluation of the total assets of the Retirement System shall be made at least once in every three (3) months, for the purpose of maintaining this fifty per cent (50%) limitation.

(7) Covered call options may be sold by the Fire and Police Employees Retirement System when the underlying common stock is held in the equity portfolio and when such options are actively traded on a public exchange, provided, however, that options are not sold on more than twenty-five per cent (25%) of the total market value of common stocks held in the portfolio. Purchase of options will be permitted only when closing out a previously written covered call option.

* * *

(8)(i) Loans secured by first mortgages, or deeds of trust, on unencumbered fee-simple or improved leasehold real estate in the District of Columbia or in any state of the United States of America or province of Canada. Whenever such loans are made upon fee-simple, or leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire and such other casualties as are included in extended coverage policies, and the said insurance policies shall contain the New York or Massachusetts standard mortgage clause or equivalent thereto and shall be delivered to the mortgagee as additional security for the said loans. Bonds, notes or other evidence of indebtedness secured by mortgages or deeds of trust which are guaranteed or insured by an instrumentality of the United States pursuant

to Acts of Congress, as heretofore and hereafter amended, known as the National Housing Act, Servicemen's Readjustment Act of 1944, and the Bankhead-Jones Farm Tenant Act; and neither the limitations of this section or any other law of this state requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured or guaranteed mortgage loans. Provided, however, that such investments in mortgages shall not exceed twenty-five percent (25%) of the total market value of all the assets of the funds of the Fire and Police Employees' Retirement System referred to herein and an evaluation of the total assets of the retirement system shall be made at least once in every three (3) months, for the purpose of maintaining this twenty-five percent (25%) limitation. Upon a foreclosure of its own mortgages or an acceptance of a deed in lieu of foreclosure by the Trustees, the said Trustees shall have the right to purchase, hold, operate, lease, manage, and/or sell the subject real estate.

(ii) Open and closed end real-estate investment pools, direct real estate investments, and unrestricted mortgage investments with equity participation. Such investments shall be included in the twenty-five percent (25%) restriction of market value of assets provided for in Section 35(a)(8)(i), with the further limitation that these investments shall not exceed ten percent (10%) of the market value of all the assets of the retirement system's funds.

Provided, however, if any such investment is in the nature of a "real estate investment pool," as defined hereinafter, then such investment shall be subject to the following restrictions:

1. With the exception of an insurance company, the investment manager shall either be registered as an investment advisor or function through an investment advisor registered with the Securities Exchange Commission under the Investment Advisors Act of 1940.

2. With the exception of an insurance company, all funds of the real estate investment pool shall be held in a trust wherein the investment manager, trustees, and all persons or entities responsible for the management, control, custody, maintenance, or investment of the funds, or having any similar responsibility in the pools shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

3. If the investment is in an insurance company's real estate investment pool, the insurance company shall have the highest rating of A.M. Best Co., and all persons or entities responsible for the management, control, custody, maintenance or investment of the funds, or having any similar responsibility, shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

4. The trust agreement shall be tax exempt under the applicable provisions of the Internal Revenue Code, Sections 401 and 501(a) or subsequent amendments or revisions thereto. In the case of insurance company pools, the pools shall satisfy the applicable requirements of the Internal Revenue Code, as amended, so that the insurance company does not pay federal income tax on the earnings of the separate accounts of such pools.

5. The trust funds of the real estate investment pool shall be immune from suit, and exempt from attachment by any creditor of any person, corporation or other entity that is responsible for the management, custody, control, maintenance, or investment of the funds, or having any similar responsibility in said pool, under any local, state, or federal law. Title to all assets of a separate account of an insurance company's real estate investment pool shall be held solely in the corporate name of the insurance company itself, and under applicable law such assets shall not be chargeable with liabilities arising out of any other business which the insurance company may conduct.

6. The real estate investment pool trust or any other agreement for such investment shall not violate the provisions of the Internal Revenue Code, Sections 401 and 501(a) or any subsequent revisions or amendments thereto, under which the Fire and Police Employees' Retirement System is qualified.

7. All unit holders or qualified investors in such a pool shall be pension or employee benefit plans or trusts qualified under Internal Revenue Code, Sections 401 and/or 501(a), or a governmental plan under Sections 414(d) and/or 818(a)(6).

8. For the purposes of this section, a real estate investment pool shall mean any investment wherein the retirement system places certain funds into a commingled trust, or a commingled separate account of a life insurance company, and wherein the trust or insurance company utilizes said funds to make certain real estate investments in the District of Columbia, or in any state of the United States of America or province of Canada, and wherein each such investor owns through units a certain equity in the investment.

* * *

(9) Ground rents in the State of Maryland.

(10) Interest, rents or other fixed income due and accrued on any of the investments authorized in the preceding subsections.

(11) Short Term Investment Funds established, operated and maintained by the contract custodian of the assets of the Fire and Police Employees' Retirement System, for the collective investment and re-investment of funds received and held by it as Trustee, Co-Trustee, or in any other fiduciary capacity described in Subtitle 5 of Title 3 of the Financial Institutions Article of the Annotated Code of Maryland (1980 Volume), or any amendment, supplement, or successor thereto or recodification thereof, which Short Term Investment Fund

has been qualified under the provisions of Section 401(a) and exempt from Federal income taxation under Section 501(a) of the Internal Revenue Code of 1945, as amended, and which is used as a temporary investment/cash management vehicle; provided that investment in such Short Term Investment Fund may be made from uninvested cash reserves held by the contract custodian, or from funds designated by the Investment Managers of the Fire and Police Employees' Retirement System funds. In connection with the participation of the Fire and Police Employees' Retirement System in such Short Term Investment Fund, where required by law or the terms of the Short Term Investment Fund, the Declaration of Trust establishing such Short Term Investment Fund is hereby adopted and made a part of the Fire and Police Employees' Retirement System to the extent such instrument does not violate the Internal Revenue Code or other applicable law and does not affect the tax qualification of the Fire and Police Employees' Retirement System, and any funds of such System invested in the Short Term Investment Fund shall be subject to all the provisions thereof, as the same may be amended from time to time.

(12) Asset Lending of securities which are under the custody of the contract custodian of the assets of the Fire and Police Employees' Retirement System, provided that: (1) such securities are loaned in accordance with the procedures set forth in the Department of Labor Prohibited Transaction Exemption 81-6 Ruling (PTE 81-6), or applicable successor regulations; (ii) the Board of Trustees shall approve or authorize the designated Investment Managers to approve the securities to be loaned, the brokers to whom such securities are loaned, and the collateral to secure assets loaned; and provided further, that before any such assets are loaned, the Board of Trustees and the Director of Finance shall, pursuant to PTE 81-6 procedures enter into a master loan agreement with the contract custodian setting forth the procedures to be followed; the broker to whom such securities will be loaned; collateral arrangements; fees; and other applicable provisions; and such master loan agreement shall be approved prior to execution by the Board of Trustees, by the Director of Finance as the desig-

nated custodian of the assets of the Fire and Police Employees' Retirement System, by the City Solicitor and the Board of Estimates; provided, however, that the market value of securities loaned shall not exceed twenty-five percent (25%) of the total market value of all assets of the Fire and Police Employees' Retirement System on any day.

The Board of Trustees shall have the duty and responsibility of periodically determining investment policies consistent with the above limitations, the capital market environment, and the actuarial characteristics of the Fire and Police Employees Retirement System and to public such investment policy guidelines by filing a copy thereof with the Department of Legislative Reference of Baltimore City, and after January 1, 1979, also by publication in the Municipal Journal).

All contributions from time to time paid into the several funds, and the income thereof, without distinction between principal and income, shall be held and administered by the Board of Trustees or its agents in the funds, and the Board shall not be required to segregate or invest separately any portion of the funds.

Provided, however, that nothing in this amendatory ordinance shall be deemed to render illegal or to invalidate the making and holding of any investment heretofore made and now remaining in said funds where such investment when made was authorized by law prior to the enactment of this amendatory ordinance; and provided further, that nothing herein shall be deemed to prevent the Board of Trustees from accepting, in lieu or substitution of securities representing investments heretofore validly made, other securities not of the kind enumerated but authorized by ordinance as investments for the said Board prior to the enactment of this amendatory ordinance, where the Board shall deem such substitution of securities desirable to preserve the investment of the said funds. Subject to the terms, provisions and conditions contained herein, said Trustees shall have full power to hold, purchase, sell, assign, transfer, and dispose of any of the secu-

rities and investments in which any of the funds created herein shall have been invested, as well as the proceeds of said investments and any moneys belonging to said funds.

* * *

(13)³(i) On the first day of the third quarter of fiscal year 1987, no monies or funds held under any provision of the retirement system shall remain invested or hereinafter by

³Sections 2 and 3 of Ord. 765, 1986 provide as follows:

"Sec. 2. And be it further ordained,

(a) That, subject to the provisions of this section, the divestiture required by Section 1 of this ordinance shall be completed with the time limit established in this ordinance.

(b) That the time limit shall begin on the first day of the third quarter of fiscal year 1987.

(c) That during the time limit the Board of Trustees of the retirement systems shall make quarterly reports to the Mayor and City Council concerning the progress of divestiture.

(d) That, during the time limit, the Board of Trustees of the retirement systems may from time to time suspend the divestiture program provided the suspending Board adopts a resolution pursuant to this section.

(e) That when a Board of Trustees of either retirement system adopts a resolution suspending the divestiture program under this section, the suspending Board shall find as follows:

(1) That the rate of return on the funds are substantially lower than the average of the annual earnings on the funds over the past five years, and

(2) That continued divestiture under this ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this ordinance, or

(3) That divestiture under the divestiture program will cause financial losses to the funds.

(f) That when a Board of Trustees of the retirement systems adopts a resolution suspending the divestiture program under this section, the resolution shall:

(1) State the standards and conclusions for the suspension;

(2) Set forth the duration of the suspension and the time of resumption of the divestiture program; however, the period of suspension shall not exceed 90 days and the time limit shall be tolled for the period of suspension; and

(3) Be in writing and shall be sent to the Mayor, President of the City Council, and the Department of Legislative Reference.

Sec. 3. And be it further ordained, That the time limit for divestiture under this ordinance is 2 years."

invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia, or to a national corporation of the Republic of South Africa or Namibia, or in the stocks, securities, or other obligations of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary or affiliate does business in or with the Republic of South Africa or Namibia.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the African Fund entitled "Unified List of United States Companies with Investments or Loans in South Africa and Namibia."

(iii) Business entities doing business in or with the Republic of Namibia shall be identified through correspondence with the United Nations' Office of the Commissioner for Namibia and the United Nations' Center for Transnational Corporations.

(b) Interest. As of July 1, 1978, the Trustee will determine the "carrying value" of the fund in accordance with the asset valuation method theretofore employed, and the "adjusted market value" of the fund representing an average fair market value as of that date.

During the 1979 fiscal year, the Trustees will establish a "reserve for book value" as of July 1, 1978, equal to the difference as of that date between the carrying value and the adjusted market value of the fund. On that date and on each annual valuation date thereafter, the value of the fund assets for actuarial valuation purposes will be carried at (1) the then current adjusted market value, plus (2) the reserve for book value.

The Board of Trustees annually shall credit regular interest less the investment management, custodian and investment advisor costs on the mean amount for the preceding year in each of the funds. After payment of pension fund manage-

ment, custodian, and investment advisor services as provided in Sections 35(g) and 43(a), any excess of the earnings of the funds of this retirement system as determined in accordance with an appropriate asset valuation method giving effect to actual earnings of the funds, over the earnings based on the regular interest rate used for valuation purposes shall first be applied by the Board of Trustees to meet the conditions of any asset averaging method then in use under the system.

An additional amount equal to one and one-half percent of the mean amount for the preceding year in each of the funds will be deducted from the remaining excess earnings, if any, and applied by the Board of Trustees to reduce the remaining balance, if any, in the "reserve for book value"; to the extent the excess earnings are less than one and one-half percent per annum, the City of Baltimore shall contribute the difference to the "reserve for book value", average over a five year period in accordance with the asset valuation method theretofore employed. The remaining excess earnings, if any, shall next be applied by the Board in such amount or amounts as they determine (1) to decrease the amount contributed by the City of Baltimore, and/or (2) to decrease the period over which the unfunded accrued liability will be amortized as provided in Section 36(d)(4), and/or (3) to reduce the remaining balance, if any, in the "reserve for book value". Any deficiency of the earnings of the funds of this retirement system, as determined in accordance with an appropriate asset valuation method giving recognition to actual earnings of the funds, below the required earnings based on the regular interest rate used for valuation purposes shall first be applied to meet the conditions of any asset averaging method then in use under the system; the remaining deficiency in earnings, if any, shall be applied by the Board of Trustees in such amount or amounts as they determine either (1) to increase the amount contributed by the City of Baltimore, and/or (2) to increase the period over which the unfunded accrued liability will be amortized as provided in Section 36(d)(4).

The increase or decrease of contribution and/or the increase or decrease in length of amortization period shall be

determined by the Board after receiving the advice of the actuary engaged by the City, on the basis of regular interest rate used for valuation purposes, and of such mortality and other tables as shall be adopted by the Board of Trustees.

The Board of Trustees shall use such portion of the net unallocated interest surplus (if any) as is deemed necessary by the actuary to cover the cost to the City of Baltimore which may result from the implementation of Ordinance 762, 1986, effective July 1, 1986.

Any unallocated interest surplus in the retirement system as of July 1, 1987, shall be applied to reduce the unfunded accrued past service liability of the system.

(c) Cash on Deposit. For the purpose of meeting disbursements for pensions, annuities, and other payments, there may be kept available cash on deposit in one or more banks or trust companies located in the City of Baltimore, organized under the laws of the State of Maryland or of the United States, in such amount as the Trustees may by resolution from time to time adopt, not exceeding a sum equal to the estimated disbursements projected for a period of fifteen days. The sums on deposit in bank shall be secured by collateral posted by the depositories of such type and amount as the Commissioners of Finance may prescribe, but in no event shall the market value of such collateral be less than one hundred per cent of the amount on deposit according to the depositories' records. In exercising this authority for bank deposits, the Trustee shall endeavor to minimize the amount of such deposits, and shall consider appropriate money management techniques, including wire transfers of funds and the zero-balance-fee-for-service method of maintaining bank balances. In no event shall the bank accounts be used as the basis for, or be used to provide supplementary compensation for such investment administrators.

(d) Securities Handling. The Custodian designated in the Charter of Baltimore City (1964 Revision, as amended) may cause any investment in securities held by the Trustees to

be registered in or transferred into the name of the Trustees or into the name of such nominee as the Custodian may direct, including a nominee partnership created by the Board of Trustees, or the Custodian may retain them unregistered and in form permitting transferability, and further may authorize its contractual agents to deposit securities with "clearing corporations" as defined in Section 8-102 of Article 95B of the Annotated Code of Maryland for the express purpose of having such clearing corporations act as centralized depositories of such securities, but the books and records of the Custodian and its contractual agents shall at all times show that all such investments are part of the several funds of the Fire and Police Employees Retirement System. The authority to make use of a clearing corporation shall include the authority to utilize the "book entry" system of the United States Government, and agencies thereof, for which the Federal Reserve Bank is the authorized fiscal agent.

(e) Conflicts of interest. Except as otherwise herein provided, no trustee and no employee of the Board of Trustees shall have any direct interest in the gains or profits of any investment made by the Board of Trustees or their designees, nor as such receive any pay or emolument for his services, except as authorized from time to time by the Board of Estimates. No trustee or employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use said gains or profits, except to make such current and necessary payments as are authorized by the Board of Trustees; nor shall any trustee or employee of the Board of Trustees become an endorser or surety or in any manner an obligor for moneys loaned by or borrowed from the Board of Trustees.

(f) Trustee Fiduciary Liability. Neither the Board of Trustees nor any agent, person or other entity acting on behalf of the Board of Trustees shall be liable for the making, retention or sale of any investment or reinvestment made as herein provided, nor for any loss or diminution of the funds, except that due to his or its own gross negligence, wilful misconduct or lack of good faith.

(g) Custodian and Supervision of Funds. The City official designated in the Charter of Baltimore City (1964 Revision, as amended) shall be the custodian of the several funds of the Fire and Police Employees Retirement System. Supervision of the several funds of the Fire and Police Employees Retirement System shall be vested in the Board of Trustees. Subject to the approval of the Board of Estimates, the Board of Trustees may hire and appoint such persons, agents or entities (including corporate fiduciaries) as in its discretion may be required or advisable to enable it to perform such pension fund investment management duties hereunder; provided further, that subject to the approval of the Board of Estimates the Board of Trustees may enter into agency and pension fund investment management agreements with one or more qualified pension fund managers for the purpose of obtaining pension fund investment management for the Fire and Police Employees Retirement System and the several funds thereof. Payment for such investment management services shall be made from the resources of the pension fund or funds.

(h) Prudent investment of funds. The Board of Trustees shall discharge its duties, with respect to the investment of the funds of the Fire and Police Employees' Retirement System, solely in the interest of the members and beneficiaries and:

(1) For the exclusive purpose of:

(i) providing benefits to members and beneficiaries; and

(ii) defraying reasonable expenses of administering the retirement system;

(2) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(3) By diversifying the investments of the retirement system's funds so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(4) In accordance with the provisions of Section 35 of this subtitle. (Ord. 492, 1985; Ord. 762, 1986; Ord. 765, 1986; Ord. 779, 1986; Ord. 794, 1986; Ord. 58, 1988; Ord. 123, 1988.)

[1983 Repl. Vol.; 1989 Supp.]

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APPENDIX C

**FIRE AND POLICE EMPLOYEES'
RETIREMENT SYSTEM
OF THE
CITY OF BALTIMORE, MARYLAND**

**ANNUAL FINANCIAL REPORT
FOR THE
FISCAL YEAR ENDED JUNE 30, 1986**

Prepared by:

**Ernest J. Glinka, Administrator
Thomas P. Taneyhill, CPA, Deputy Administrator
Charles W. Parker, Accountant Supervisor**

*** * ***

**Fire and Police Employees' Retirement System
City of Baltimore, Maryland**

NOTES TO FINANCIAL STATEMENTS

1. The Reporting Entity:

The Fire and Police Employees' Retirement System of the City of Baltimore (F&P) is a defined benefit local retirement plan covering officers and most employees of the Fire and Police Departments. Established July 1, 1962, the plan is managed by a Board of Trustees in accordance with Article 22 of the Baltimore City Code. Prior to the above date, all fire and police personnel were members of the Employees' Retirement System. Upon the creation of the F&P, eligible personnel automatically transferred thereto except for those who elected to remain in the Employees' Retirement System, the plan which covers City employees with the exception of those required to join the F&P, the Maryland State retirement systems, or the Elected Officials' Retirement System.

Based on the reporting entity oversight responsibility criteria, as defined by the National Council on Governmental Accounting Statement #3, the F&P is a component unit of the City of Baltimore, the oversight unit, and is reported as such. Oversight responsibility is derived from the governmental unit's power and includes, but is not limited to financial interdependency, designation of management, ability to significantly influence operations, and accountability for fiscal matters. The F&P does not exercise oversight responsibility for any other unit.

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C-3

**EMPLOYEES' RETIREMENT SYSTEM
OF THE
CITY OF BALTIMORE, MARYLAND**

**ANNUAL FINANCIAL REPORT
FOR THE
FISCAL YEAR ENDED JUNE 30, 1986**

Prepared by:

**Ernest J. Glinka, Administrator
Thomas P. Taneyhill, CPA, Deputy Administrator
Charles W. Parker, Accountant Supervisor**

* * *

**Employees' Retirement System
City of Baltimore, Maryland**

NOTES TO FINANCIAL STATEMENTS

1. The Reporting Entity:

The Employees' Retirement System of the City of Baltimore (ERS), a defined benefit local retirement plan, established January 1, 1926, is administered in accordance with Article 22 of the Baltimore City Code. The plan covers most employees of the City with the exception of those required to join the Maryland State retirement systems, the Fire and Police Employees' Retirement System, or the Elected Officials' Retirement System.

Based on the reporting oversight responsibility criteria, as defined by the National Council on Governmental Accounting System #3, the ERS is a component unit of the City of Baltimore, the oversight unit, and is reported as such.

Oversight responsibility is derived from the governmental unit's power and includes, but is not limited to financial interdependency, designation of management, ability to significantly influence operations, and accountability for fiscal matters. The ERS does not exercise oversight responsibility for any other unit.

* * * *

**ELECTED OFFICIALS' RETIREMENT SYSTEM
OF THE
CITY OF BALTIMORE, MARYLAND**

**ANNUAL FINANCIAL REPORT
FOR THE
FISCAL YEAR ENDED JUNE 30, 1986**

Prepared by:

**Ernest J. Glinka, Administrator
Thomas P. Taneyhill, CPA, Deputy Administrator
Charles W. Parker, Accountant Supervisor**

* * *

**Elected Officials' Retirement System
City of Baltimore, Maryland**

NOTES TO FINANCIAL STATEMENTS

June 30, 1986

1. The Reporting Entity:

The Elected Officials' Retirement System of the City of Baltimore (EOS), a defined benefit local retirement plan, established December 5, 1983, is administered in accordance with Article 22 of the Baltimore City Code. The plan covers the Mayor, the Comptroller, and the President and all members of the City Council. All elected Baltimore City officials are required to join except for those officials who are members of the Employees' Retirement System of the City of Baltimore who may choose to remain members of that system. At the above date two officials in the Employees' Retirement System chose to remain members thereof.

Based on the reporting entity oversight responsibility criteria, as defined by the National Council on Governmental Accounting Statement #3, the EOS is a component unit of the City of Baltimore, the oversight unit, and is reported as such. Oversight responsibility is derived from the governmental unit's power and includes, but is not limited to financial interdependency, designation of management, ability to significantly influence operations, and accountability for fiscal matters. The EOS does not exercise oversight responsibility for any other unit.

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